Nos. 22541 A-G, 22574, 22575, 22576 A-L, 22577A, 22578 A-C

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN PIPE AND CONSTRUCTION CO.,

Appellant,

vs.

THE STATE OF CALIFORNIA, *et al.*,

Appellees.

On Appeal From the United States District Courts for The: Northern District of California, Central District of California, Southern District of California, Western District of Washington, and District of Oregon.

REPLY BRIEF FOR THE APPELLANT.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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REPLY BRIEF FOR THE APPELLANT.

This brief is submitted by appellant in reply to the Brief for the Appellees.

Supplemental Statement of the Case.

Appellees' brief, which does not contain a citation to a single case and which contains a total of three record references,[1] relies almost exclusively on certain

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[1]Appellees' brief, in disregard of Rule 18 of this Court, contains many statements (without record references) which purport to be based on the record but which, in fact, are erroneous. Due to the press of time caused by the accelerated briefing schedule, appellant can only correct those which are egregious. Similarly, appellant refuses to engage, as appellees have done, in vitriolic name calling. Instead, this reply brief will be directed to the issues before the Court.

revisions of the challenged order which, according to appellees, were "adopted" by Judge Pence on February 23, 1968.[2] Consequently, it is incumbent upon appellant to supplement the statement of the case.

Appellees (Ap. Br. p. 2, f.3) state that there is no record support for appellant's assertion that these cases were "channeled by the Chief Judge of this Court and by the Chief Judges of the various districts involved to Judge Martin Pence . . . *for all further proceedings* . . ." therein (Op. Br. pp. 3-4).[3] As a matter of fact, however, the record compels appellant's conclusion. For example, the Chief Judge of the Northern District of California entered an assignment order (App. pp. 24-25) which transferred all cases then pending in that District to Judge Pence who has been ". . . designated to sit in this district for all proceedings in said cases by the Honorable Richard H. Chambers . . ." If appellant is in error in this regard, so is Judge Pence as indicated by the following exchange:

> "Mr. Ferguson: [appellees' counsel] The three judge portion of it is really not your Honor bringing in three judges. These cases have been pending in the courts of these two other judges. These courts have had jurisdiction of these cases from the time they were filed.

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[2]On February 21, 1968, Judge Pence announced his intention to enter, over appellant's objection, Paragraph 26 of Pretrial Order No. 15. However, appellant did not receive a copy of said order which was entered on February 26th until March 1, 1968. So also, on February 23rd, appellant's consent was sought and obtained by Judge Pence to his filing of an *amicus curiae* brief in these appeals (See Ex. A). As of March 1st, appellant had not received a copy of said *amicus* brief.

[3]"Op. Br. pp. ...." refers to appellant's brief. "Ap. Br. p. ...." refers to appellees' brief.

These cases were filed in—some of these cases were filed in the districts of each of these other two judges.

It's true that your Honor was appointed to supervise the pretrial discovery.

The Court: Oh, no. It [the order] said that it [the cases] had been assigned to me for all purposes.

Mr. Ferguson: Well—

The Court: Not just for supervision." [Tr. Jan. 12, 1968 pretrial conference, p. 22; see also p. 81].

Appellees would have this Court believe that Judge Pence never did and has not now ordered that three trials would be conducted at the same time. Although it is unnecessary to stray from the face of the challenged order, the following exchange which occurred at the December 14, 1966, pretrial conference, is illuminating:

"The Court: Well, I can say that if we decide, if this court decides that all these cases will be tried simultaneously or practically simultaneously, you are going to have to split yourself into three personalities and be in three different locations at one time.

Mr. Jansen: [counsel for appellant] Well, that I think is impossible.

The Court: Well, if it is impossible, you—if we do decide that it is going to be tried that way, you are going to have to decide which one you are going to try." (App. p. 248).[4]

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[4]Subsequently, on February 21, 1967, Judge Pence first entered an order which on its face would require appellant to proceed on three fronts at once.

Appellees do *not* contend that Paragraph 26 of Pre-Trial Order No. 15 is really different from the old order. Instead, they say that the new order has "considerably clarified" and "made more explicit" the challenged order (Ap. Br. p. 5). A legislative copy of the two orders[5] reveals that, while some minor details may have been clarified, the basic vice remains. In other words, there has been a change in form but not in substance. Despite appellees' "issue" set forth as 1(b) (Ap. Br. p. 6) which is that "The challenged order is now moot," their argument concedes that "pretrial order No. 15 . . . embodies the same concept." as No. 14 and that the appeal is *not moot* (Ap. Br. p. 8).[6] The concept of "three overlapping trials" is not a cure—it does not even lessen the pain. Under the prior order, there was the possibility—however remote—that the case which started first would be well advanced before the other commenced. Now, the first case will begin on or before June 24, 1968, and each successive case will commence thereafter at intervals of "not less than" two weeks. Prior to the entry of Pre-Trial Order No. 15, it was necessary for appellant to delve into the record to establish that the simultaneous trials were not accidental,

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[5]The legislative copy of the two orders is appended as Exhibit B hereto.

[6]Once again, appellees have raised a red herring by charging that appellant sought appellate review for purpose of delay. Appellant has met every deadline established by the trial court (with one exception caused by a major operation undergone by appellant's lead counsel.) So also, it was appellant who proposed in this Court the accelerated briefing schedule and a modified stay order which would permit discovery and other proceedings to continue in the trial court. Since the entry of this Court's February 5th order, appellant has taken a four-day deposition of appellees' primary economic expert (over the objection of appellees who sought delay). In addition, the trial court on February 20-21, 1968, held a two-day pretrial conference and ruled on many important matters.

but were deliberately planned. Now, there can be no mistake—Judge Pence's determination to force concurrent trials evidences that, absent guidance and direction from this Court, he has a closed mind on this subject.[7]

The sheer concept of "orderly processing of three overlapping trials" of complex cases[8] staggers the imagination and the conversion of the three judge panel into a group composed of Judge Pence and two consultants who are present but not presiding is a meaningless change in form which does not go to the heart of the problem. If the purpose of the three judge panel was to avoid conflicts in rulings (Ap. Br. p. 3), are we now to assume that Judge Pence will make binding rulings on crucial matters which will apply to the trial of all the cases?

Pre-Trial Order No. 15 does contain one new item *viz.* at the proposed meeting of the three judges Judge Pence will "(f) take such action as is necessary for transfer or assignment of the designated cases to such judges."[9] This leaves everyone in the dark as to how the transfer will be accomplished but we will assume, *arguendo,* that it will be accomplished in a proper manner.

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[7]Moreover, the finality of Judge Pence's determination in this regard is established by his proposed *amicus curiae* brief. Although said brief was not received before this reply brief went to the printer, the fact that one will be filed is rather extraordinary to say the least.

[8]Appellee's brief (p. 2) indicates they will offer proof of some 2,200 purchase transactions, approximately 250 witnesses are involved and plaintiffs rely upon thousands of documents.

[9]Previously the proposed trial sites were Seattle, San Francisco and Los Angeles (App. p. 244). Sub-paragraph (e) of Paragraph 26 indicates that San Diego will now be considered as a trial site.

I.

Appellees Do Not Deny That the Challenged Order Will Cause Prejudice to Appellant; They Merely Assert That They Also May Be Prejudiced.

Appellees do not dispute the showing made by appellant (Op. Br. pp. 13-16) of the many prejudicial results which necessarily will flow from the challenged order. Instead, they argue (Ap. Br. p. 7) that they will be faced with the same problems and, in fact, the impact on them would be more severe. This begs the question. The fact that *they* are willing to gamble that somehow they will receive a fair trial does not mean that appellant should be precluded from seeking assurance that its vital rights will not be impaired.

Furthermore, appellees' concession that the challenged order would have an equal or even greater impact on them highlights the plight of appellant. As we observed (Op. Br. p. 6), the various plaintiffs below are represented by a battery of at least 20 groups of counsel who have been engaged in these cases for years.[10] Obviously, the many problems posed by the order cannot be solved merely by engaging additional counsel.

Appellees' response to the problem relating to the document depository (Op. Br. p. 16) is that it would be a problem regardless of the method of consolidation (Ap. Br. p. 8, n. 6). Quite obviously, this is incorrect. A single consolidated trial in Los Angeles would obviate the problem entirely, and, if the trials were held in sequence, the documents could be moved from site to site.

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[10]Appellees do not deny this fact in their brief. We respectfully refer the Court to the affidavit of service which accompanies this brief for a listing of counsel and their respective clients.

Appellees argue (p. 12) that the impact on appellant of undergoing three trials at once should be lessened because it has had sixteen months to prepare therefor. In the first place, it was not until February 21, 1967, that Judge Pence first decided to hold simultaneous trials and, even as late as June 12, 1967, he indicated that he might reconsider the matter (App. p. 267). Secondly, ample time to prepare for multiple concurrent trials could never overcome the serious handicaps which appellant will face *at trial* (Op. Br. pp. 14-16).

Finally, appellees take exception to the statement in our opening brief that "American selected a single economic expert . . ." and assert that appellant has "at least as many expert witnesses on this case (sic) as do appellees" (Ap. Br. p. 7, n. 6). During the week of February 12, 1968, appellant took the deposition of appellees' chief expert.[11] He testified that he was assisted in the preparation of his price study by a statistician, an engineer and by five computer analysts and programmers. Appellant learned for the first time that none of these experts is completely familiar with the fields of expertise of the others. Hence, it appears that each of these experts will testify on appellees' behalf if the testimony of any is to be admitted. Therefore, appellant in the immediate future will indeed be forced to engage equivalent experts in these various technical fields.[12] This points up the unworkable, unnecessary and prejudicial nature of the order. Each of appellant's experts must be present during the presenta-

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[11]Appellee Washington Public Power Supply System has its own group of experts.

[12]To illustrate, appellees' computer data are written in Fortran —a specialized computer language which is not utilized or even understood by all computer experts, much less by lawyers.

tion of plaintiffs' case to provide counsel with information for cross-examination. Such information would be relatively meaningless to a trial attorney who was not familiar with these extremely technical aspects of the case.

II.

Consolidation Can Be Effected Provided That It Does Not Cause Prejudice.

Appellant has never opposed appropriate consolidation—even consolidation which transcends district boundaries. As noted in its opening brief, appellant suggested two alternatives to the concept of a three ring trial. It proposed either (a) consolidation so as to permit three trials *in sequence* before Judge Pence or (b) a single conolidated jury trial on the issue of liability before Judge Pence to be followed, if necessary, by a trial of the damage issue before Judge Pence without a jury. Appellees proposed seven separate trials (three simultaneous trials, followed by three more simultaneous trials and finally by a single trial). Under appellees' formula, three cases would be tried by Judge Pence. Thus, appellant's workable proposals would have resulted in judicial economy and savings of time. Despite the fact that all plaintiffs now claim damages flowing from an alleged single common conspiracy, these proposals were rejected out of hand in favor of a program which, appellees now concede, presents many grave problems to both sides and which will not reduce the trial time. Appellees' claim (Ap. Br. p. 9) that no one "could conceivably claim that these cases could all be tried separately, without considerable overlapping." The short answer to this is that Judge Pence believed it was

possible before he decided to put three fires to appellant's feet at one time.[13]

Appellant has never insisted that each of the 27 cases be separately tried. It has consistently urged the adoption of any formula—including complete consolidation—which would avoid the severe prejudice inherent in the program of appellees and the trial court. Appellees are in a strained position. They urge that the order be affirmed despite the grave complications which it will cause. Yet, they reject any other plan of consolidation which would overcome these problems.

Appellees profess to see an inconsistency between appellant's need to attack deliberately planned simultaneous trials and its statement that it would not be in this Court if *coincidentally* each of the 27 cases had proceeded to trial simultaneously. What appellant is saying is that if each case had been handled in a *normal* fashion within each district and if (despite the long odds) by happenstance all were ready for trial simultaneously, it could not complain. Appellant is here because the cases under the guidance of this Court were scrambled together in an extraordinary fashion in the interests of justice and its administration, and are now being separated in an extraordinary fashion in the interest of forcing this small defendant to its knees. In a situation such as this, the cases should either remain scrambled or be unscrambled with extreme care and with due regard for the right of a defendant to present a defense free from arbitrary and highly prejudicial administrative procedures.

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[13]In October, 1966, a tentative trial plan was established which contemplated four trials with reasonable respites in between each one.

Appellees, in blithe disregard of the requirements of paragraph 3[14] of Rule 18 of the Rules of this Court, inject certain aspects of the "electrical cases" into their argument (Ap. Br. pp. 10, A-1).

There being absolutely nothing in the records of these cases, either in this Court or below, to support appellees' unsubstantiated assertions, appellant could disregard them.[15] However, this Court may wish a response to that matter, no matter how improperly it was presented, and appellant has no hesitancy in providing it, with appropriate source references.[16]

The so-called "electrical equipment cases" consisted of approximately nineteen hundred (1900) separate treble damage actions filed in thirty-five (35) separate judicial districts throughout the United States in the 1961-1963 period. Insofar as appears in the referenced study, none of those nineteen hundred cases was consolidated with any other at the pre-trial stages and separated at trial time. To the contrary, the Co-ordinating Committee for Multiple Litigation established by Chief Justice Warren made it crystal clear throughout its existence that the committee had no intention of making *rulings*, as opposed to recommendations, in the myriad

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[14]Rule 18, paragraph 3 incorporates with regard to appellees' brief paragraph 2(e) of the same rule, which requires a "precise argument of the case . . . exhibiting a clear statement of the points of law or facts to be discussed, *with a reference to the pages of record and the authorities relied upon in support of each point.*" (Emphasis supplied).

[15]See, *e.g.*, *Smith v. United States*, 343 F.2d 539, 541 (5th Cir. 1965), *cert. denied*, 382 U.S. 878 (1965); *Chesapeake & Ohio Ry. Co. v. Greenup*, 175 F.2d 169, 171 (6th Cir. 1949); *Bono v. United States*, 113 F.2d 724, 725 (2d Cir. 1940).

[16]The information hereafter is found in CCH 1966 New York State Bar Association Antitrust Law Symposium (hereafter "CCH 1966 Antitrust Law Symposium") at pp. 55-90. The study there contained is copiously authenticated.

of cases. As Judge Byrne, a member of the Co-ordinating Commiteee, said:

> "I have no jurisdiction again I say, to sit here and determine anything. I only have it when I am sitting in my own district."[17]

What did occur in some of the electrical equipment cases was *consolidation for trial after* they had proceeded in pre-trial as individual, albeit partially coordinated, cases in their own districts.[18]

Thus, taking appellees' unauthenticated statements at face value, it is hardly surprising or shocking that of some nineteen hundred cases filed in thirty-five districts, three or four would come to trial in widely separated districts within the same 30-day period. What is surprising is appellees' attempt to sustain the calculated effort of the trial court in the twenty-seven cases at bar by reference to the unintentional occurrences in the nineteen hundred electrical equipment cases.[19]

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[17]Transcript of Proceedings in the Electrical Equipment Antitrust cases, W.D. Tex., Feb. 6, 1963, at 5, cited in CCH 1966 Antitrust Law Symposium at 61.

[18]CCH 1966 Antitrust Law Symposium at 76.

[19]Another aspect of appellees' brief is equally or perhaps even more surprising. That is their utter distortion of the record on a point, however irrelevant it may be to this appeal, upon which appellees seem to place great reliance. At three separate points in their brief, appellees assert that appellant has saved $500,000 per year or more by the procedures adopted in these cases (Ap. Br. p. 8, n. 5; p. 10, n. 7; p. 12). They rely upon a statement by appellant's general counsel, Mr. Jansen, that he came into these cases in the interest of saving, if possible, some of the then current $500,000 per year which appellant was spending in the defense of these cases (App. pp. 247, 248).

Certain savings in appellant's litigation expenditures have occurred (see p. 43, petition for writ of mandamus, Case No. 22336), not by a reduction in the number of counsel devoted to appellant's defense, as appellees insinuate, but by effecting certain

(This footnote is continued on the next page)

III.

This Court Has Rendered No Decision Regarding The Validity of the Appeal.

Instead of providing any assistance to the Court on the applicability of the collateral order doctrine, appellees cavalierly presume that this Court has decided that an appeal will not lie as a matter of law. Appellees' reluctance to face this important issue is as understandable as it is inexcusable. Without response by appellees, however, appellant can only reiterate its contention expressed in Point III of its opening brief that the order here in question is reviewable on appeal as well as on mandamus.

Conclusion.

Regardless of the descriptive term which is used (*e.g.* simultaneous, practically simultaneous, overlapping or concurrent) it is plain that the trial court is determined to force appellant to undergo three trials at once. In the unique circumstances present here, this is a clear abuse of discretion and an order should be entered directing Judge Pence to vacate the challenged order.

Respectfully submitted,

George W. Jansen,
James O. Sullivan,
Wayne M. Pitluck,
Paul B. Wells,
Attorneys for Appellant, American Pipe and Construction Co.

Dated: March 4, 1968.

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efficiencies in that defense. It is appellant's position that no addition of counsel and no amount of increased expenditure could alleviate the prejudice which it would suffer under the simultaneous trial procedure from which it appeals.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

George W. Jansen

EXHIBIT "A."

American Pipe and Construction Co.
Corporate Headquarters:
400 South Atlantic Boulevard
Monterey Park, California 91754

Please reply to:
110 Laurel Street
San Diego, California 92101
(714) 233-6337

February 24, 1968

Hon. Martin Pence, Chief Judge
United States District Court
District of Hawaii
U.S. Courthouse and Post Office
Honolulu, Hawaii

Re: American Pipe and Construction Co. v. The State of California, et al
U.S. Court of Appeals, Ninth Circuit
Nos. 22541 A-G, 22574, 22575, 22576 A-L, 22577 A, 22578 A-C.

Dear Judge Pence:

Pursuant to your request, I am happy to consent on behalf of appellant American Pipe and Construction Co. to the filing of a brief amicus curiae by you in the above captioned matter. This consent is pursuant to the provisions of Rule 18.-9.(a).

Respectfully yours,
GEORGE W. JANSEN

GWJ:mmj

EXHIBIT "B."

Legislative Copy of the Orders.

[Note: Words from Paragraph 5S of Pre-Trial Order No. 14 which have been deleted from Paragraph 26 of Pre-Trial Order No. 15 have been stricken and words which did not appear in Paragraph 5S are underscored.]

"26. A pre-trial conference is set for ~~February 21, 1968~~ June 5, 1968 at 9:30 a.m. in San Francisco, California, ~~at which time trial judges~~ before Judge Martin Pence (D. Hawaii), with Judges George Boldt (W.D. Wash.), Alfonso Zirpoli (N.D. Calif.), and/or such other judges as may be designated, ~~will preside~~ present. At such time, ~~the trial judges will~~ after hearing, and after consultation with the other judges, Judge Pence will (a) select not less than three cases for separate trial ~~in any district or districts as may be required~~; (b) select the districts in which such trials will be held; (c) ~~select the~~ determine the judge to preside in each such district; (d) determine whether other cases pending in any such district should be consolidated for trial; ~~At such conference, a final pre-trial order shall be formulated which sets each designated case or cases for trial to commence at such time as the presiding judge shall determine, but in no event later than March 18, 1968.~~ (e) formulate a final pretrial order for each trial case, setting such cases for trial at such times as will permit the orderly processing of three overlapping trials, with the first trial to commence before Judge Pence in either the Southern or Central District of California no later than June 24, 1968, and with each succeeding trial to commence thereafter at intervals of

not less than two weeks each; and (f) take such action as is necessary for transfer or assignment of the designated cases to such judges. Among other things, the following matters will be considered:

~~(1)~~ (A) The voir dire examination;

~~(2)~~ (B) The form of a summary to be read to the jury to explain the contentions of the parties and the issues;

~~(3)~~ (C) The number of jury challenges permitted, the number of alternate jurors to be impaneled, and the necessity that a verdict be returned by a jury of twelve;

~~(4)~~ (D) Jury instructions and special interrogatories;

~~(5)~~ (E) Counsel's opening statements;

~~(6)~~ (F) The days and hours of the week during which court will be conducted;

~~(7)~~ (G) Designation of a spokesman if either plaintiffs or defendants have multiple counsel;

~~(8)~~ (H) Daily trial transcripts;

~~(9)~~ (I) A current index of the trial record;

~~(10)~~ (J) The handling of documentary evidence at trial;

~~(11)~~ (K) The scope of testimony of witnesses to be called at trial and possible limitations with respect thereto;

~~(12)~~ (L) The use of depositions, including the possible use of narrative summaries or verbatim extracts;

~~(13)~~ (M) The parties' report on their attempts to stipulate as to facts;

~~(14)~~ (N) Further pre-trial proceedings;

~~(15)~~ (O) Rulings on objections to designated deposition testimony and documentary evidence, where possible;

~~(16)~~ (P) Possibility of settlement."

IN THE UNITED STATES COURT OF APPEALS

For the Ninth Circuit

Nos. 22541 A-G, 22574,
22575, 22576 A-L,
22577A, 22578 A-C

American Pipe and Construction Co., Appellant

v.

The State of California, et al., Appellees

AFFIDAVIT OF SERVICE BY MAIL

For

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

AND TO APPEAR AND MAKE ORAL ARGUMENT;

PROPOSED ORDER GRANTING LEAVE TO MOVANT TO FILE

BRIEF AS AMICUS CURIAE AND TO APPEAR

AND MAKE ORAL ARGUMENT;

and

BRIEF OF AMICUS CURIAE IN OPPOSITION

TO BRIEF OF APPLICANT

AFFIDAVIT OF SERVICE BY MAIL

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

JOSEF D. COOPER, being first duly sworn, says:

That affiant is a citizen of the United States and a resident of the county aforesaid; that affiant is over the age of eighteen years and is not a party to the within above-entitled actions; that affiant's business address is Room 310, United States Courthouse, Honolulu, Hawaii, 96810: that on the 28th day of February, 1968, affiant served MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND TO APPEAR AND MAKE ORAL ARGUMENT; PROPOSED ORDER GRANTING LEAVE TO MOVANT TO FILE BRIEF AS AMICUS CURIAE AND TO APPEAR AND MAKE ORAL ARGUMENT; and BRIEF OF AMICUS CURIAE IN OPPOSITION TO BRIEF OF APPLICANT on the parties by placing a true copy thereof in separate envelopes addressed to the following attorneys of record representing parties in the actions herein:

John W. Riley, Esq.
Houghton, Cluck, Coughlin,
Schubat & Riley
320 Central Building
Seattle, Washington 98104

William H. Ferguson, Esq.
Ferguson & Burdell
929 Logan Building
Seattle, Washington

George W. Jansen
James O. Sullivan
Wayne M. Pitluck
110 Laurel Street
San Diego, California 92101

Paul R. Wells
Procopio, Cory, Hargreaves
& Savitch
1900 First National Bank Bldg.
San Diego, California 92101

and by then sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States Post Office mail box at Honolulu, Hawaii.

Executed on February 29, 1968, at Honolulu, Hawaii.

Josef D. Cooper
JOSEF D. COOPER

Subscribed and sworn to before me
this 29th day of February, 1968.

Albert Grain
Notary Public in and for said
County and State

NOTARY PUBLIC
First Judicial Circuit
State of Hawaii
My commission expires: Nov. 21, 1969